IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

Death Sentence Reference No. 2 of 2006

S.C.NO.111/2001 of ADDL. DISTRICT COURT (ADHOC-I), KALPETTA
.....

COMPLAINANT:

STATE OF KERALA

BY SHRI K.C.SANTHOSHKUMAR, PUBLIC PROSECUTOR

RESPONDENT/ACCUSED:

RAJEEV @ KRISHNA KUMAR,
S/O.DAMODERAN NAMBIAR,
SAROJA NIVAS,MANANTHAVADY.

BY ADV. SHRI.P.K.RAMKUMAR AND SHRI M.S.SAJI

THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 28/09/2007, ALONG WITH CRL.APPEAL NO.2314 OF 2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY & K.HEMA, JJ.

D.S.R.No.2/2006 &
Crl. Appeal No.2314/2006

Dated this the 28th day of September, 2007

Judgment

Koshy,J.

Sole accused in Sessions Case No.111 of 2001 on the file of the Additional Sessions Court (Ad hoc-I), Kalpetta was alleged to have committed house trespass and murdered a 33 year old woman and her two children - 9 year old son and 7 year old daughter. He is also accused of inflicting grievous injuries on another child aged 9 who was examined as PW14. The Sessions Court found him guilty and imposed death penalty for the offence punishable under section 302 of the Indian Penal Code subject to confirmation by this court. He was further sentenced to undergo rigorous imprisonment for 10 years, one year, 10 years, 7 years, 5 years and 3 years respectively for offences punishable under sections 449, 342, 307, 397, 506 (ii) and 201 of the Indian Penal Code. The death sentence reference is numbered as D.S.R.No.2 of 2006. Appeal filed by the accused is numbered as Crl. Appeal No.2314 of 2006.

2. The allegation of the prosecution, as summarised by the trial judge,is as follows:

> "The accused committed house trespass into the house of CW3 bearing house number IV/414 of Mananthavady Panchayat situated at Kuzhinilam Puthenpura, about 5 k.ms. west from Mananthavady town on the western side of Mananthavady-Thalassery public road on 9.7.1999 in between 8.30 p.m. and 10.00 p.m. with intention to commit robbery and with preparation to commit murder when CW3 was not available in his house. Thereafter, the accused wrongfully confined the inmates therein bolting the front door from inside the house and threatened wife of CW3, Rosamma with death showing chopper demanding money and when she opposed the same the accused hit her with chopper with intention to kill her. When her children Jobin, aged nine years and Josna @ Thanku, aged seven years came near to her seeing this, the accused gave blows to the children also with chopper. He again hit several times Rosamma and the above two children with chopper causing fatal injuries and all of them succumbed to the injuries on the spot. In that incident, the accused caused grievous hurt to Robin, twin brother of the above said Jobin cutting with chopper with intention to murder him. Thereafter, the accused committed theft of three gold bangles and one gold chain worn by Rosamma and another gold chain kept in the wall almirah weighing total six and quarter sovereigns. It is also alleged that the accused threw away blood-stained bath towel into the bush on the side of the road, blood-stained chopper and socks into the nearby property and blood-stained pants and shirt into the drainage at Mananthavady town thereby the accused caused disappearance of evidence of the commission of the offence.

> Thus, the accused is alleged to have committed the above said offences."

Even though the incident occurred in the night of 9.7.1999, the accused was arrested only on 9.1.2001. After framing of the charge sheet, the case was posted for trial from 21.12.2004. Counsel for the defence applied for time. That was not allowed and an advocate was appointed as State Brief and PWs 1 to 40 were examined and Exts.P1 to 46 were marked. The accused approached this court by filing Crl. R.P. No.2431 of 2004 and that was allowed and the accused was allowed to engage an advocate of his own choice and the persons who were already examined were recalled and an opportunity was given for further examination of those witnesses. Accused denied the allegations against him and all incriminating evidence adduced by the prosecution in 313 statement and he also examined two defence witnesses. He also marked Exts.D1 to 7. Before going into the merits of the case, we may consider the medical evidence.

3. Postmortem examination of the deceased Rosamma was conducted by PW25 doctor. He noticed the following ante-mortem injuries in Ext.P15 certificate:

"1. Incised wound oblique 9 x 3 x 6 c.m. on back of left half of chest, upper inner end in mid line 19 c.m. below root of neck, lower left end 25 c.m. below root of neck and 7 c.m. left of mid line upper edge was rounded and lower edge sharp. Wound was directed upwards and inwards cutting ribs 6.7 and 8 near the vertebral end and entering chest cavity. Back aspect of lower lobe of left lung was cut 2 x 2 x 1 c.m. There was no blood in chest cavity.

2. Incised wound 4 x 1 x 3 c.m. back of chest in mid line, transversely placed. Left end touching injury No.1. Wound was directed towards left, inwards and outwards and entering chest cavity through 7th intercostal space. There was no injury to lung.

3. Incised wound 7 x 2 x 2 c.m. on back of left shoulder oblique upper edge 4 c.m. below top of shoulder and 11 c.m., left of mid line.

4. Incised wound 4 x 1 x 3 c.m. on back of left shoulder, upper end 3 c.m. below top of shoulder and 7 c.m. to the left of mid line.

5. Superficial incised wound 7 x 0.1 skin deep on back of chest upper edge at root of neck.

6. Superficial incised wound 10 c.m. long back of left shoulder blade.

7. Superficial incised wound 20 x 0.2 c.m. long curved on back of left shoulder blade upper edge in mid line and 8 c.m. below root of neck.

8. Superficial incised wound 20 x 0.1 c.m. back and outer aspect of left chest, upper edge 4 c.m. below armpit.

9. Superficial incised wound 15 c.m. long on back of chest upper edge in mid line and 1 c.m. above injury No.1.

10. Incised wound 3.5 x 0.1 x 1.5 c.m. on top of left shoulder in sagittal plane 7 c.m. left of mid line.

11. Abrasion 5 x 1 c.m. on front of left arm 7 c.m. above elbow.

12. Incised wound 13 x 4 c.m. back of left side of head left end 1 c.m. above ear, right end 6 c.m. right of mid line 6 c.m. above root of neck. Wound entered the cranial cavity by cutting left temporal and occipital bone 10 x 1 c.m. Left temporal and occipital lobe was cut 3 x 1 x 1 c.m. Subarachnoid bleeding around the injury of brain.

13. Incised wound 8 x 2 c.m. bone deep on right side of head, lower right edge 6 c.m. above root of neck upper left end 11 c.m. above rot of neck and 4 c.m. left of mid line.

14. Incised wound 9 x 2 c.m. oblique on back of head, lower left edge 12 c.m. above root of neck and upper right edge 17 c.m. above root of neck and 8 c.m. right of mid line.

15. Incised wound 9 x 4 x 7 c.m. on top of right shoulder 7 c.m., right of mid line wound was directed downwards and inwards injuring the muscles and blood vessels.

16. Abrasion 4 x 2 c.m. on right side of injury No.15.

17. Incised wound 15 x 2 x 3 c.m. on left side of head. Lower front edge touching middle of eye brow and upper back

> edge 16 c.m. above root of neck. Beneath this injury left frontal and parietal bone was cut 8 x 0.5 x 2 c.m. and injuring dura and brain.
>
> 18. Incised wound cutting an area of scalp 5 x 3 c.m. on left side of head, 3 .m. above forehead. The area was chipped off.
>
> 19. Incised wound 16 x 2 x 2 c.m. on right side of forehead and head front end at eye brow 2 c.m. right of mid line, back end 4 c.m. to the left of mid line.
>
> 20. Incised wound 9 x 7 x 3 c.m. starting at front of wrist, cutting all the metacarpal bones and tendons. Only skin remaining uncut at the back of hand.
>
> 21. Tip of index finger cut and lost, middle finger cut at middle phalanx but not detached. Ring finger cut at distal phalanx.
>
> 22. L shaped wound on front of face over left malar eninence over an area 3 x 2 c.m.

Out of the above injuries, according to the doctor, injury Nos.1, 2, 12, 15 and 17 were fatal.

4. The same doctor conducted postmortem examination of the body of Josna and noted the following injuries in Ext.P14 certificate:

> "1. C shaped incised wound both ends sharp 16 c.m. long on front of head, forehead right side lower left and 4 c.m. above root of nose in mid line. Right edge 3 c.m. above right eye brow and 6 c.m. right of mid line. Beneath this injury, cut on

the skull 8 x 7 c.m. exposing the meninges. Dura intact. Underneath this injury subarachanoid haemorrhage over an area 5 x 4 c.m. of right frontal and parietal lobe with contusion 4 x 0.5 c.m.

2. Incised wound 16 c.m. long transversely placed in back of head right and 1 c.m. long above right ear and left and 7 c.m. to the left of mid line. Wound was placed 10 c.m. above root of neck. Beneath this injury occipital and right temporal bone was cut. Dura also cut. An area of 2 x 2 c.m. brain tissue showed laceration.

3. Incised wound 4 x 1 c.m.muscle deep on back of neck (left side) lower inner and 3 c.m. to the left of mid line 0.2 c.m. above root of neck. Inner end shows tailing of 2 c.m. Outer end 2.5 c.m. above root of neck.

4. Incised wound 1.50 x 0.3 c.m. muscle deep on back of right side of chest 3 c.m. below top of shoulder and 7 c.m. to the right of mid line.

5. Contusion 1.50 x 0.3 c.m. left ear lobe (back aspect).

6. Lacerated wound 0.1 x 0.1 c.m. on upper aspect of left ear lobe.

7. Abrasion 1.50 x 0.5 c.m. outer aspect of right wrist.

8. Multiple contused abrasions over an area 6 x 3 c.m. on inner aspect of right arm 3 c.m. below arm pit.

9. Multiple contused abrasions over an area 5 x 3 c.m. on out4er aspect of right chest.

10. Contused abrasion 11 x 2 c.m. on front of right thigh and knee.

11. Multiple contused abrasions over an area 5 x 3 c.m. in front of right ankle.

12. Abrasion 2 x 1 c.m. on top of right foot 5 c.m. in front of ankle."

5. PW25 doctor also conducted the postmortem of Jobin and noticed two fatal injuries sufficient in the ordinary course of nature to cause death in Ext.P16. They are as follows:

"1. Incised wound, C shaped 23 c.m. long on left side of head, forehead and back of head 5 c.m. above left ear. Front end 1 c.m. above outer aspect of right eye brow. Back end 7 c.m. above root of neck and 3 c.m. to the right of mid line. Both ends sharp. Wound entered cranial cavity by cutting left frontal parietal and occipital bones. Dura was cut. Left temporal, parietal and occipital lobe was cut 13 x .5 x5 c.m cerebellum also cut.

2. Incised wound 11 c.m. long on left side of head lower front end at the middle of left eye brow and 4 c.m. to the left of mid line. Upper back end 11 c.m. above ear. Dura was cut 3 c.m. long. Brain laceration 3 x 1.5 x .5 c.m. of left parietal lobe.

3. Incised wound 5 c.m. long on left ear lobe. Ear lobe separated entirely except for lower 1 c.m.

4. Incised wound 1.5 x 0.5 x 0.5 c.m. just in front of left ear.

5. Incised wound 9 x 3 x 1 c.m. back of neck left side inner lower end 2 c.m. above root of neck and 1 c.m. to the left of

mid line.

6. Incised wound 8 x 2.5 c.m. on back of left hand upper edge 3 c.m. below wrist and in line with knukle of left ring finger. Lower end cutting entire thumb in middle except for skin of palmar aspect. Metcarpals and tendons of index and middle finger cut entirely."

Doctor also deposed that after examination, the dead bodies were placed in the refrigerator on 11.7.1999 at 3.35 a.m. and injuries were sustained 24 hours prior to that time. From the medical evidence, it can be seen that all the three persons died due to homicidal injuries and they must have suffered death before 3.30 a.m. on 10.7.1999. There is no dispute that the dead bodies were found in the house itself. Being death sentence reference, we shall also consider all relevant evidence adduced in this case.

6. PW1 gave Ext.P1 first information before the Mananthavady police station. He was supervisor of the properties of sisters of a convent situated at Puthenpura. He also stated that Kuzhinilam is a place about 1 k.m. away from Puthenpura. Near to the convent of the sisters, there is a seminary by name Norbert house and driver of the seminary was one Jose and his house is situated on the side of Mananthavady-Thalassery public

road. There is only a distance of about 300 metres to the house from the seminary and the seminary and house of Jose are situated on the opposite side of Mananthavady-Thalassery road. On 10.7.1999 at 3.00 p.m. he went near to the house of Jose to apply pesticide for the plantains cultivated in the paddy field of the convent situated adjacent to the house of Jose and he went to the house of Jose to obtain a knife to open a pesticide bottle. Electric bulb in front of the house was lighted. He pressed the bell, but, nobody opened the door. Then, he went to the back of the house calling wife of Jose. Then, the kitchen door was found opened and wife of Jose Rosamma was lying in the other room in front of the door. He entered the kitchen calling her. In the next room, younger daughter was lying in a pool of blood. He also noticed that another child was also lying in the kitchen without any movement. Immediately, he went to Norbert House and stated the facts to the priests and nuns present in the Norbert House. Two priests and a nun came to the house in a jeep and entered the house through the kitchen door. Robin who was lying in the kitchen was groaning. Immediately, they took Robin to St. Joseph's Hospital, Mananthavady in that jeep. The hospital

authorities directed the patient to Government Hospital, Mananthavady. First aid was given there and he was referred to the Medical College Hospital, Kozhikode. The priest proceeded to Kozhikode with the child after directing PW1 to inform the police. Accordingly, he gave Ext.P1 first information statement. According to PW1, when they took PW14 to the hospital, dead bodies of Rosamma and two children were lying there. He also deposed that on the previous day at 5.00 p.m. he had seen Rosamma and her children at their courtyard while he was doing agricultural work in the paddy field near to that house. When he enquired about Jose, wife of Jose replied that Jose had gone to Chickmangalur with the priests and he would come back on that day itself. He also stated that he had shown to the police the house of Jose.

7. PW2 is the husband of deceased Rosamma and father of the deceased children. He was residing at Kuzhinilam from 1993 and he was the driver of Norbert House. He went to Chickmangalur on 7.7.1999 with priests of the seminary to attend a function. He also stated that apart from the salary, he was getting income from sale of milk and rearing cows and goats. He was also having plantation cultivation and ginger cultivation. He

further deposed that he was getting money from brokerage and he got Rs.1,20,000/- in two property transactions. Some amount received by the sale of a cow was kept in the shelf. His wife used to wear three bangles and a thali chain. There was nobody else in his house apart from his wife and children on the alleged date of incident. He returned to Mananthavady on 10.7.1999 evening even before function was over as told by the priests. When they reached near Mananthavady, one of the priests drove the vehicle and told him that some accident occurred to his wife and on Sunday, at 4.00 a.m., they reached at Norbert House and he was asked to sit in a room. He was told later that a thief had entered into his house and only at 7.00 a.m. on that day he came to know about the demise of his wife and children. On that day at 7.00 p.m. dead bodies arrived. He came to know that his son Robin was admitted in the hospital. He was allowed by the police to go to that hospital only after 2-3 days. He identified a bath towel which was used in his house which was marked as MO1. One chain weighing three sovereign kept in a tin was identified by him as MO2. He also identified MOs 3 to 8, ornaments of his wife and daughter. It is his case

that his wife and children were murdered for committing robbery of valuables.

8. PWs 3 to 5 are inmates of Norbert House during the period. PW3, a 65 year old nun, deposed that she had seen the dead body of Rosamma and her two children. On that day at 9.00 a.m. when she went to the hospital with the kitchen maid of Norbert House, light in the house of Jose was burning. Even though she rang calling bell, there was no sound. Then she knocked on the window, but, there was no response. When she returned at 1.00 p.m. also, the light was burning. In the evening, she came to know about the death of Rosamma and children. PW4 who is a priest deposed that he was told by PW1 that Rosamma was lying in a pool of blood in her house on 10.7.1999 at 3.00 p.m. Immediately, he along with PWs 1 and 3 and with another priest went to the house of Jose in a jeep, They entered into the house through back door of the house. Dead body of Rosamma and Josna were found inside the house. Robin was sitting in the room near the dead body of Rosamma. There was cut injury on the head of Robin. Hence, he was taken to St. Joseph's Hospital, Mananthavady and from there he was taken to Government Hospital, Mananthavady. After first

aid and dressing the injury, he was referred to the Medical College Hospital, Kozhikode. They took him to Fathima Hospital, Kozhikode and admitted there. At that time, Robin could say only some words like 'thief, thief, cut' etc. and he was not in a position to narrate the incident. PW5 is another inmate (priest) of Norbin House. He stated he had gone to Bangalore on 7.7.1999 in the Tata Sumo Jeep driven by PW2. On 8.7.1999, there was a function. On 9.7.1999 at 10.00 a.m. they proceeded to Chickmangalur. On 10.7.1999 at 4.00 p.m. he got information that Rosamma and children were murdered. Immediately, they returned to Mananthavady and the matter was informed to Jose step by step. They reached Kuzhinilam at 4.30 a.m. Jose was sent to Norbert House and PW5 went to the house of Jose on that day at night. On 14.7.1999, he, along with Jose, went to Fathima Hospital. He also deposed that Rs.1,63,000/- was recovered from the house of Jose and that was entrusted at Norbert House by the police. That amount was handed over to Jose and, in turn, it was deposited in the bank. PW5 was also present. PW5 was a witness to the recovery mahazar Ext.P2. PWs 6 to 8 are witnesses to Exts.P3 to P5 inquest reports. PW6 identified MO4, PW7 identified

MOs 8, 13 and 14 and PW8 identified MOs 5, 7, 15 to 17. PW9 accompanied Robin to the hospital at Mananthavady and then to Fathima Hospital, Kozhikode. He was an inmate of Norbert House at that time. PW10 was a Supervisor of Norbert House. He deposed that he was also present when the police inspected the place of occurrence and its premises. As per Ext.P6 seizure mahazar, one chopper and a socks were recovered which were identified as Mos 18 and 19. Another bath towel was also recovered from the road side after preparing Ext.P7 seizure mahazar. PW11 was a nun of St.Cammila Seminary during the year 1999. She deposed that she had purchased a cow from Rosamma for Rs.15,000/-. Rs.10,000/- was given at first and the balance Rs.5,000/- was given to Rosamma on 9.7.1999 at 12 noon. PW12 deposed that he sold 20 acres of property to the convent for Rs.24 lakhs and PW2 Jose was the broker in that transaction and Rs.75,000/- was given to him. PW17 deposed that he sold property through PW2 for Rs.1.5 lakhs per acre and he had given Rs.20,000/- to PW2 as a gift. PW13 is the husband of Rosamma's sister Ancy. He has not seen the incident. He has signed Ext.P8 recovery mahazar of MOs 2 and 21.

9. PW14 is the only eye witness to the incident. He is a twin brother of deceased Jobin and at the time of incident, he was aged only 9 years. He is a natural witness as he was the only survivor of the inmates of the house who was present at the time of incident. He is also an injured witness. He was examined in chief in 2004. He was aged 14 and was studying in Std. VIII at that time. Final cross examination was conducted only in 2006. By the time final cross-examination was conducted, he has completed the age of 15. There are five rooms in the house. Outside there is a light which they switch on in the evening. There is a calling bell and there are no nearby houses. ' വീട്ടിനടുത്ത് വിളിച്ചാൽ കേൾക്കുന്നവീടുകൾ ഇല്ല. ' He deposed that his mother, brother and sister are the dead. In his house, apart from the deceased, only he and his father were living. On 7.7.1999, his father had gone to Bangalore as a driver of the priests and he was expected back on 9th. Mother's father and Bineesh, son of mother's brother, was requested to stay there before PW2 proceeded to Bangalore. They returned on the morning of 9.7.1999 as they expected Jose to return on 9.7.1999. He

and his brother and sister returned to the house from the school at noon on the fateful day. Thereafter, his mother went to the school to attend the P.T.A. meeting and returned at 5.30 p.m. According to him, the incident occurred at 8.30 p.m. on 9.7.1999. Somebody rang the calling bell. There was no sound from the bell, but, there was sparking from the bell. Then, knocked the door. PW14 was in the dining room. Mother, sister and brother looked through the window hearing the knocking sound. His mother opened the door. The accused entered into the front room and requested for a bath towel to wipe his body stating that he was wet in the rain and he came there to go to Puthenpura colony. His pants and shirt were also wet. PW14 took a bath towel and gave it to the accused. The accused wiped his head with the towel and returned it to the witness. He placed that towel in the room in which sewing machine was kept. The accused took a comb from his pocket and combed his hair. At that time, the witness found handle of a knife in his waist. After combing, the accused went near to the front door and put his footwear inside the room which was kept outside. Mother, brother and sister were near to the door. After putting the footwear inside,

the accused pushed his mother into the room. Mother ran to backside room. At that time, accused closed the front door and he placed his leg in front of the mother. Mother fell down near to the door from dining room to kitchen. He deposed as follows:

> 'വാതിലിൽ മുട്ടുന്നത് കേട്ട് അനിയനും അനിയത്തിയും ജനലിൽ കൂടി നോക്കി. അമ്മയും നോക്കി .അമ്മ വാതിൽ തുറന്നപ്പോൾ ഞാൻ ചെന്നു. പ്രതി മുൻവശം മുറിയിൽ കയറിയിട്ട് പുത്തൻപുര കോളനിയിൽ പോകാൻ വന്നതാണ്. മഴ നനഞ്ഞു. തോർത്ത് തരുമോ എന്ന് ചോദിച്ചു. വണ്ടി റോഡിലാണ് നിർത്തിയത് എന്ന് . പ്രതിയുടെ ഷർട്ടും പാന്റും ചെറുതായി നനഞ്ഞിരുന്നു. തയ്യൽ മെഷീൻ വെച്ച മൂറിയിൽ പോയി ഞാൻ തോർത്തു കൊണ്ടുവന്നു പ്രതിക്ക് കൊടുത്തു.പ്രതി തോർത്തു കൊണ്ട് തല തോർത്തി. എന്റെ കൈയിൽ തോർത്തു തന്നു. ഞാൻ തോർത്ത് മെഷീൻ റൂമിൽ കൊണ്ടിട്ടു. പ്രതി പാന്റിന്റെ പോക്കറ്റിൽ നിന്ന് ചീപ്പ് എടുത്ത് മുടിചീകി. മുടി ചീകുംപോൾ കത്തിയുടെ പിടി അരയിൽ കണ്ടു. പ്രതി മുടി ചീകി കഴിഞ്ഞ് front door-നടുത്തേക്ക് പോയി പുറത്ത് വച്ചിരുന്ന അവന്റെ ചെരുപ്പ് എടുത്ത് ഉള്ളിലോട്ട് ഇട്ടു. അന്നേരം അമ്മയും സഹോദരങ്ങളും വാതിലിനടുത്തായിരുന്നു. ചെരിപ്പ് ഉള്ളിലോട്ട് ഇട്ട ശേഷം പ്രതി അമ്മയെ ഉള്ളിലേക്ക് മാറ്റിയിട്ടു. അമ്മ പുറകുവശം റൂമിലേക്ക് ഓടി. പ്രതി front door അടച്ചു. അമ്മ കാൽ വച്ചു വീഴ്ത്തി . ഭക്ഷണം കഴിക്കുന്ന മുറിയിൽനിന്ന് അടുക്കളയിലേക്ക് കടക്കുന്ന വാതിലിനടുത്തായി അമ്മ വീണു.'

He further deposed that all children cried when mother fell down. Mother pulled on the pocket of the accused. Then, some coins and a beedi fell down. Then, the accused beat his mother. Thereafter, the accused cut PW14 with a chopper on the left side of his head causing bleeding injury. He fell down near the door to the

bedroom from the dining room. He also found his brother and sister lying in the prayer room with cut injuries. PW14 laid beneath the cot placed in the room opposite to the dining hall. The accused came to that room and pulled out some materials. After some time, PW14 went near to his mother and laid there. There was bleeding from his mother.

> 'അമ്മ വീണപ്പോൾ ഞങ്ങൾ എല്ലാവരും കരഞ്ഞു. അമ്മ അവന്റെ പോക്കറ്റ് പിടിച്ചു വലിച്ചു. അപ്പോൾ കുറച്ചു coins-ഉം ഒരു ബീഡിക്കുറ്റിയും വീണു. അമ്മയെ പരിക്കേൽപ്പിച്ചത് കണ്ടില്ല. അമ്മയെ അടിച്ചു എന്നെ വാക്കത്തി കൊണ്ട് പ്രതി വെട്ടി. തലക്ക് ഇടതു ഭാഗത്ത് വെട്ടി. പരിക്കുപറ്റി രക്തം വന്നു. ഞാൻ വീണു. ഭക്ഷണം കഴിക്കുന്ന മുറിയുടെയും കിടക്കുന്ന റൂമിന്റെയും വാതിലിനിടക്ക് വീണുകിടന്നു. സഹോദരങ്ങൾ വെട്ടുകൊണ്ടു മുന്നിലെ കുരിശു വരക്കുന്ന മുറിയിൽ കിടക്കുന്നത് കണ്ടു. ഞാൻ dining hall-ന്റെ എതിർവശത്തെ റൂമിലെ കട്ടിലിനടിയിൽ പോയി കിടന്നു.ആ മുറിയിൽ പ്രതി വന്ന് എന്തൊക്കെയോ വലിച്ചിട്ടു. കുറച്ചു കഴിഞ്ഞപ്പോൾ ഞാൻ അമ്മയുടെ അടുത്ത് പോയി കിടന്നു. അമ്മക്ക് ചോര ഒലിക്കുന്നുണ്ടായിരുന്നു.'

According to him, a white cover like socks was in the hands of the accused. There was a watch in his hand. He also deposed that after some time, the accused was found watching to Norbert House standing on the back side of the kitchen. At that time, chopper and socks were in his hand. There was light in the house and after some time, there was no light. At about 3.30 a.m. the accused went near to the pipe and brushed his teeth. Thereafter, he did not see the accused. At dawn, PW14 went outside and

called the newspaper man, but, he did not hear it. Then, he came inside the house and drank water. After drinking water, he sat near his mother. In the afternoon, PW1 came and called them. None answered to the call and PW1 came through back side of the house. Thereafter, he went away and returned with Fr. John (PW4) and Fr. Murikan and a nun. He was taken to the St. Joseph's Hospital and then to Government Hospital. From there, he was taken to Fathima Hospital, Kozhikode. He was treated at Fathima Hospital for about one and a half months. Thereafter, he continued physiotherapy at Fathima Hospital, Kalpetta. PW14 further deposed that he could clearly understand the physical features of the accused. He was a tall man having pointed face. He was having thick moustache and hole of his nose was big. His chappels were black. He gave the description of the accused to the drawing master at the Guest House and drawing master drew a picture. That portrait was marked as MO22. He has seen the accused in the Sulthanbathery court and identified him to the magistrate. He could point out that person three times from a gang of 10-12 persons. He identified MO1 bath towel, MO18 chopper and MO19 socks allegedly worn by the accused. He also identified the trousers, cap,

sweater and shirt which were marked as MOs 9 to 12. PW14 further deposed that forehead and ears of the accused were big and eyebrows were thick. He identified him in the court also. In cross-examination, he was asked whether he was tutored. He denied the same and also stated that he will never forget the person who murdered his mother, brother and sister.

'എന്റെ അമ്മയേയും സഹോദരങ്ങളേയും വെട്ടിക്കൊല
പ്പെടുത്തിയ ആളെ എനിക്ക് മറക്കില്ല.'

He was elaborately cross-examined, but, his evidence in the chief examination was not shattered. He stated that immediately after he got the injury he went beneath a cot. His vision of the accused was not momentarily and his version that he will not forget the person who killed his mother, brother and sister and assaulted him can be believed as truth considering ordinary human standard.

10. PWs 15 and 16 are two travellers in the jeep in which the accused alleged to have come just before the incident and alighted in front of Norbert House. PW 15 is a resident of Thalapuzha. She along with her sister-in-law had gone to Cheeral at morning on that day and they returned to Thalapuzha from Mananthavady in a jeep. They were sitting in the back

side of the jeep just behind the driver. In that seat, two male travellers were also there. In the opposite seat, four other male travellers were also there. That jeep started from Mananthavady by 7.30 p.m. At that time one person came rushing and entered into the jeep and stood hanging on the back. When the jeep reached Kaniyaram, the person sat near the sister-in-law of PW15 alighted there. Then, the person who was hanging on the back entered the jeep and sat near to her sister-in-law. When the jeep reached at the Puthenpura colony stop, another person alighted there. The person who was first hanging on the back side of the jeep requested to get down from the jeep when the jeep reached Puthenpura estate. Then the driver replied that the stop was Puthenpura colony and it was over and next stop is Norbert House stop. Then, he requested to stop at Norbert House. When the jeep reached near Norbert House stop, he requested to alight there. There was light inside the jeep. It is stated that the person was tall and lean. His pants were black and shirt was of soil colour. She identified the accused in the court. She also identified him from a gang of 10 to 20 persons before the Magistrate at Sulthanbathery. She also stated

that she gave the features of the person to the drawing master (PW19) and he drew a picture, MO22. PW16 also gave similar evidence. He also gave features of the person to the drawing master to draw MO22. PW16 also identified the accused during the test identification parade before the Magistrate and in the court. PW17 was examined to show that PW2, huband of deceased, acted as a broker when he sold his propertyand he gave Rs.20,000/- as gift. PW18 was the Panchayat president. He also stated that he has seen the accused at Thalapuzha within a week just before the incident. After the incident, accused was not available at the locality. He further stated that he is not aware whether accused was involved in any other case or has any criminal background.

11. PW19 was the drawing master at Ambedkar Memorial Model Residential Government Higher Secondary School at Nalloornadu. He received the news regarding the murder of a mother and two children at Kuzhinilam. According to him, principal required him to draw the picture of the accused. One or two persons gave some details and several sketches were made and finally a portrait was completed in oil paint. That was handed over to the Dy. Superintendent of Police and the portrait

was marked as MO22. He further deposed that the portrait he has drawn has got some similarity with the accused. His evidence is fully supported by PW20 principal of the Higher Secondary School. PW21 was running a night tea shop in a movable bunk shop on the road side in front of Shanthi Emporium near Gandhi Park, Mananthavady. He had acquaintance with the accused for about 18 years. The accused was an auto driver for about 4-5 years at Mananthavady. He left Mananthavady bout six years prior to the incident. Thereafter, he was seen only occasionally. During the period of the alleged incident, he had seen him at Mananthavady. But, he did not say in accordance with the 161 statement given to the police that he has seen the accused in his tea shop on the next day of incident in the early morning (Ext.P10). Therefore, he was declared hostile. In cross-examination also, he stated that he cannot remember the date when he has last seen the accused. But, he deposed that on one day early morning at about 2.00 a.m. accused came to his tea shop and he was wet with rain water. He is not remembering whether he has taken tea. On that day, accused was wearing pants and shirt and accused told PW21 that he is coming from a hospital. He deposed as

follows:

> 'പ്രതി ഒരു ദിവം പുലർച്ചെ 2 മണി കഴിഞ്ഞ ശേഷം മഴ നനഞ്ഞിട്ട് എന്റെ കടയിൽ വന്നു. ആശുപത്രിഭാഗത്തു നിന്നാണ് വന്നത്. അന്ന പ്രതി എന്റെ കടയിൽ നിന്ന് ചായ കുടിച്ചോ എന്ന് ഓർമ്മയില്ല. ഷർട്ടും പാന്റുമാണ് പ്രതി ഇട്ടിരുന്നത്. എന്താ മഴ നനഞ്ഞുവരുന്നതെന്ന് ഞാൻ ചോദിച്ചു. ആശുപത്രിയിൽ പോയിട്ടു വരികയാണ് എന്ന് പ്രതി പറഞ്ഞു. അത് കുഴിനിലം കൂട്ടക്കൊല അറിഞ്ഞ ദിവസമാണ് എന്ന് പറഞ്ഞാൽ ഓർമ്മയില്ല. സംഭവം അറിഞ്ഞ് പിറെ ദിവസം രാത്രി ടൗണിൽ വന്നപ്പോഴാണ്.'

We are not considering the evidence of PW22 as he was not cross-examined as PW22 was abroad and when he reached for being cross-examined. PW23 was doing shoe polishing. According to him, he met the accused in the train and accused told that his name is Krishnakumar. PWs 23 and 24 have not given any useful evidence. But, PW24 who was the manager of a wine shop only deposed that the accused used to take liquor from that shop. We have already seen the evidence of PW25, doctor who conducted the postmortem of the dead bodies.

12. PW26 was the Neuro Surgeon of Fathima Hospital, Kozhikode who treated Robin and issued Ext.P17 discharge certificate. It is stated in Ext.P17 discharge certificate that at the time when he was admitted on 10.7.1999 the wound on the head was sutured at

Mananthavady and he was conscious, but, was unable to talk. The certificate further shows as follows:

> "Fracture left parietal bone. Huematinu left temper parietal region. Air bubles present in the brain.
>
> Emergency craniotomy done.
>
> At the time of discharge, patient talks well. Remembers the past events. Memory appears to be good.
>
> Rt. hemiparesis present.
>
> Subsequently patient has been attending the hospital as outpatient."

PW26 was cross-examined in detail. He stated as follows:

> "Memory appears to be good. Right hemiparesis present. Subsequently, patient has been attending the hospital as outpatient. On 14.10.2000, patient attended the outpatient department. Memory was good, power on right side has improved to grade four. He is still on anti-epileptic medication. Nature of injury grievous. This certificate is issued by me on 23.3.2001 and is signed by me, is marked as Ext.P17. In my opinion, injury could be caused by this weapon. This injury could cause retrograde amnesia and post-traumatic amnesia. This recover after sometime."

But, in cross-examination, he stated that he cannot say whether the patient was having retrograde amnesia and post-traumatic amnesia when he was admitted. Further, he stated that retrograde amnesia means loss of memory

regarding incidents prior to the date of injury. It can be total or partial loss of memory depending on circumstances. He can only say that at the time of discharge, the patient was talking well, remembered past events also and his memory was good. In all cases like this, it need not necessarily cause retrograde amnesia and post-traumatic amnesia. At the time of discharge, partial paralysis was present for the patient. Ext.P17 certificate was issued basing on the case sheet of the patient maintained at the hospital.

13. Now, we will come to the wound certificate issued in respect of Ext.PW14. It is stated in Ext.P29 certificate issued by the District Hospital, Mananthavady that he was brought to the hospital by Fr.John, Norbert House (PW4). At that time, the child was conscious responding partially to questions. Condition on discharge is: "Child conscious, vital signs stable." Opinion as to cause of injury is stated as: "May be due to a sharp blow to the head." The above certificate was proved by PW36. She stated that it can be caused by a weapon like MO18 which was shown to her. PW27 was examined to prove that there was a power cut from 9.00 p.m. to 9.30 p.m. in the locality. PW30 then Judicial First Class Magistrate,

Sulthanbathery conducted test identification parade wherein accused was pointed out by PWs 14, 15 and 16. He deposed that they identified the accused. He marked Exts.P20 to P23. But, he stated that he was not aware whether they had seen the accused before he was brought before the court for test identification or whether he was brought to Mananthavady with mask etc. The evidenciary value of test identification parade is only to corroborate the evidence adduced before the trial court. In Amitsingh Bhikamsigh Thakaur v. State of Maharashtra ((2007) 2 SCC 310), the Apex Court has stated the legal position in regard to the identification of the accused through a test identification parade. It was held as follows:

> "The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye-witnesses of the crime. The identification proceedings are

> in the nature of tests and significantly, therefore, there is no provision for it in the Code of Criminal Procedure, 1973 (in short 'the Code') and the Evidence Act, 1872 (in short 'the Evidence Act'). It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution."

The substantive evidence of a witness is his evidence in court and identification parade helps the investigation for enabling the police to correctly identify the accused. Identification made in identification parade can be used only for corroborating the substantive evidence adduced in the court. (See: Sampat Tatyada Shinde v. State of Maharashtra - AIR 1974 SC 791 and Hasib v. State of Bihar - AIR 1972 SC 283). When the witness has opportunity to see the accused for some time at the time of commission of offence identification parade itself is not necessary (See: Romesh Kumar and another v. State of Punjab (1993 Crl. LJ 1800). In this case, PW14, the injured child witness had ample time of identifying the accused. He himself faced horrible situation. His

mother, brother and sister were killed. His identification of the accused at the scene is sufficient. Other evidence like the evidence of PWs 15 and 16 also shows that they have seen the accused alighted near to the house of the accused after about 8.00 p.m. on the fateful day. Here, on the basis of evidence adduced, we can safely conclude that even if test identification parade is excluded and identification of accused is proved by the prosecution.

14. PW35 doctor, while working as Assistant Professor in Forensic Department, Medical College, Kozhikode collected hair samples from the accused. He also collected hair samples of PW 14 and PW2. The hair samples collected from the accused and other two witnesses were forwarded to the Court with letters marked Exts.P27 and P28. PW39 was the Assistant Director of Biology Division, Forensic Science Laboratory, Thiruvananthapuram. His report is marked as Ext.P34. He deposed that he examined the scene of occurrence, collected ten material objects from the scene of occurrence, packed them separately and sealed the packets after labelling each packets properly. He visited the place of occurrence on 11.7.1999. His information

regarding the place where injured Robin was lying and other dead bodies were lying was only hearsay. After sealing them, all the packets were handed over to the investigating officer. The seven packets containing hair samples collected from the scene of occurrence are marked as MO46 series. Out of that, item No.6 is the hairs collected from an old and torn white towel. Those hairs in item Nos.53 to 55 in Ext.P34 were the hairs taken from the accused Rajeev, from Jose (PW2) and from Robin (PW14). He compared the hairs in item Nos.53 to 55 and that of the three deceased with the hairs contained in item No.6. He further deposed as follows:

> "The result of comparison is mentioned by me in page 17 of Ext.P34. Item No.53 is the hair collected from the person of the accused. Three human scalp hairs with telogen root in item 6. Ext.P34 are similar to sample scalp hairs in item 53 of Ext.P34. MO1 now shown to me is the towel from which I collected item No.6 of Ext.P34, hair samples from the scene. Four human scalp hairs in item No.6 are similar to the hair samples of deceased Rosamma. Two human scalp hairs in item 6 are similar to the sample scalp hairs of deceased Josna. One human scalp hair in item 6 is similar to the sample scalp hairs of deceased Jobin. No hair similar to the sample scalp hairs of Jose and Robin (item Nos. 54 and 55) is detected in item No.6."

In cross-examination, he stated as follows:

> "Hair examination is not an absolute identification of a person just like fingerprints and DNA profiling. But, it is not possible to find two persons with identical similarities in hairs (witness adds). Microscopic examination is a good as Mito-chodrial DNA examination as far as hair isk concerned. I disagree with that suggestion that there may be more than one person with identical hair samples."

He conducted only microscopic inspection. Then he deposed as follows:

> "As per Ext.P34, item No.6 (d) and item No.53, there is no change in the parameters except in length. Is it correct to say that this is happened because those two items were taken from the very same person at the same time (Q). It is not correct (A). In other items No.6 (a) to (c), there were no root balls, because they were cut hairs. As an international standard, minimum 25 specimen samples are needed for an effective microscopic comparison. I have not counted the specimen hairs received by me. It was more than 25. If it was less than 25, it would have been specifically mentioned. There was no practice at FSL to examine the material objects then and there as soon as it was received there."

15. PWs 31 to 34, 37, 38 and 40 were police officers who conducted investigation. PW31 recorded Ext.P1 first information statement from PW1 and registered Ext.P1 (a) FIR. Ext.P4 inquest report was prepared by him in respect of the dead body of Jobin. Sweater, pants and silver girdle are marked as MOs 13, 14

and 8 respectively. He also stated that they were entrusted to the C.I. of Police (PW32) who took over the investigation. PW32 conducted inquest of the body of Josna and prepared Ext.P5 inquest report and sweater, petticoat, half-skirt, silver girdle and studs were taken. They were marked as MOs 15, 16, 17, 7 and 5 respectively. PW33 who was the then C.I. of Police at Sulthanbathery conducted inquest of Rosamma and her skirt (MO23), nighty (MO24), brassiere (MO25), shuddy (MO26), ornaments etc. were recovered as per Ext.P3 inquest report. PW34 recovered MOs 30 to 45 and prepared Ext.P24 scene mahazar. On 16.7.1999 at 11.00 a.m., MO 20 bath towel was recovered as per Ext.P7 seizure mahazar from the southern side road margin of Mananthavady-Thalassery public road, about 25 metres away from the scene of occurrence. On that day itself at 12.00 noon, MO18 chopper and MO 19 socks were recovered from the bottom of a coconut sapling situated on the side of the above road about 100 metres away from the place of occurrence as per Ext.P6 mahazar. He questioned the witness and recorded their statements. The property lists by which properties were forwarded to the Court on 14.7.1999, 15.7.1999 and 17.7.1999 were marked as Exts.P36 to 38. Those items

were received in court as per P.R.Nos.197/99, 198/99 and 200/99 respectively on respective dates. PW37 who was the Deputy Superintendent of Police during the time of incident took over the investigation on 13.7.1999 and PW38 detecting inspector of Crime Branch took over investigation from 28.8.1999 to 11.10.1999 when investigation was conducted by C.B.C.(D) Special Investigation Group III.

16. PW40 conducted main investigation who was the Deputy Superintendent of Police, C.B.C.I.D., S.I.G. III. He deposed that from the description given by PWs 14, 15 and 16 and from MO22 portrait he found that the person in the photo has similarity with Rajeevan @ Krishnakumar. On enquiry, he found that he is he was convicted in many cases and he was in judicial custody at Coimbatore Jail in connection with a theft case, Crime No.84/2002 of Pothannoore Railway Police Station. PW40 saw the accused on 26.12.2000 when produced before the Court at Coimbatore and satisfied sthat he has got striking similarity with the person in the portrait. So, on 5.1.2001, he submitted an application before the Judicial First Class Magistrate-II, Mananthavady for including his name in the array of the accused and to

issue production warrant. That report was marked as Ext.P39. Thus sit is known that the accused was produced before Mananthavady Court on 9.1.2001. On 11.1.2001, he submitted an application before the Chief Judicial Magistrate, Kalpetta to conduct a test identification parade. He stated that accused gave a statement that he had thrown up the shirt and pants in a drainage near Gandhi Park. But, those items were not recovered from there. Similarly, accused confessed that he had thrown the chopper, socks and bath towel in the land on the other side of the road. But, on the basis of confession as pointed out by the accused, police team went to that spot, but, no articles were able to be recovered.

17. Two witnesses were examined for defence. DW1 was the property clerk of the Judicial First Class Magistrate's Court-I at Mananthavady at that time and identified Ext.D6 despatch register to show that properties were despatched to the Regional Chemical Examiner's Lab. In cross-examination, it was stated that it was wrongly sent to Regional Chemical Examiner's Lab and thereafter it was required to send to FSL as per Ext.D6 (b). DW2 was the News Editor of Deshabhimani. On 23.2.2001 news regarding the arrest of the accused with

photo was published in the newspaper marked as Ext.D7 and D7 (a). No other oral evidence was adduced on the side of the accused.

18. Contention of the counsel for the accused is that his client is innocent. Somebody due to enmity arising out of financial transactions with PW2 must have done the crime. Considering the number of injuries more than one person might have inflicted the injuries. Appellant was simply made a scapegoat as election was nearing and public was demanding for finding out the accused. Hence, police wanted an accused to be arrested in this case and the appellant was the victim. The trial court found that PW14, though a child witness can be believed. It is true that before believing a child witness, court should be assured that he was not a tutored witness and he was capable of remembering things. If, according to the court, there is possibility of tutoring, court should be careful in accepting the evidence of child witness as held by the Apex Court in Bhagwan Singh and others v. State of MP ((2003) 3 SCC 21). According to the medical certificate, he was conscious even on the next day when he was brought to the hospital. At the time when wound certificate was

taken, he was able to talk also, but, at the time when they reached Kozhikode, he was unable to talk. Even at that time, he was conscious and at the time of discharge, doctor certified that he was able to remember things. It is true that he was aged only 9 at the time of incident. At the time of examination, he was aged 14. He suffered very serious injuries in the head, but, for his luck, he escaped from death. He saw the brutal killing of his mother, brother and sister by the chopper. He will never forget the person who inflicted several injuries on him. His identification of the accused cannot be doubted at all. There is no allegation of the prosecution that any of the investigating officers or any of the witnesses were in inimical terms with the accused. There is no reason to book the appellant as the accused even if a scapegoat is necessary for the police. In any event, there is not even an allegation that PW2, father of the child, or the priest in the Norbert House are inimical to the accused. So, there is no chance of tutoring the child witness regarding the identification of the accused. There is no evidence that he was having amnesia or he was unable to remember things. Medical evidence shows that he as conscious when he was taken to

the hospital and he was able to remember all past events. After going through the evidence, according to us, there is no reason to disbelieve the child witness. The trial judge, who saw the demeanor of the witness, also believed him.

19. The Supreme Court in Dattu Ramrao Sakhare v. State of Maharashtra ((1997) 5 SCC 341) held that evidence of a child witness can be the basis of conviction even in the absence of oath, provided, child witness was able to understand the questions put to him and able to give rational answers thereof and his evidence is otherwise reliable. Merely because a witness is a child, it cannot be rejected if it is found otherwise reliable and evidence of child witness has to be evaluated carefully. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored as it is easy to teach a child witness. After close scrutiny, evidence of child witness can be accepted

if the evidence is credible. (See: Surya Narayana v. State of Karnataka (AIR 2001 SC 482) and N. Somashekar v. State of Karnataka (AIR 2005 SC 1510).

20. It is argued that PW14 was questioned only on 23.7.1999 and delay is fatal to the prosecution case and appellant relied on certain observations of the Apex Court in Zafar v. State of UP (AIR 2003 SC 931). In that case, no explanation was given for the delay in taking statement under section 161 from the child. The Hon'ble Apex Court, while setting aside an order of acquittal passed by the High Court considering the evidence of a 13 year old child witness whose 161 statement was taken after considerable delay in Prithvi (Minor) v. Mam Raj and others (AIR 2004 SC 2729), observed as follows:

> "14. The High Court also found fault with the investigating officer that he did not take a statement in writing from Prithvi since it was admitted by Dr. Lakhera that Prithvi was in a position to write and could have written if he was literate. Appreciation of witness's evidence requires an empathetic approach. The Court must place itself in the situation in which the witness was to appreciate the circumstances. Here we have a child of about 13 years who receives a stunning blow on his head sufficient to make him semi-conscious, if not, unconscious. The head injury renders him speechless, literally and figuratively. In these circumstances, it is inhuman to expect an investigating officer to interrogate the child at that stage and ask the child to write down

> what he knows. Neither the witness nor the investigating officer was a robot bereft of humanity to do this. Taking the totality of the picture, it appears to us that this reasoning for disbelieving witness Prithvi was wholly perverse."

With regard to the number of injuries on the mother, observations of the Supreme Court in the above judgment at paragraph 16 is as follows:

> "16. We are afraid that mathematics does not strictly work in appreciation of such evidence. A child who is rudely woken upon from his slumber by a lathi blow on his head is not expected to count the number of lathis or the number of blows given so that the Court could correlate them mathematically to the post-mortem certificate. That the child survived the murderous attack itself is a piece of extreme good fortune. To accept this exactitude from the evidence of such a witness, is asking for the impossible."

In this case, due to medical reasons, four days' delay occurred. Ext.P17 certificate, evidence of PW26 and PW36, doctor, explain the reasons for the delay. It was argued that there is only one eye witness and on the basis of evidence of a solitary eye witness, that too, of a child, accused cannot be convicted. It is the mandate of section 134 of the Evidence Act that quality and not quantity of evidence is important as the applicable maxim is 'evidence has to be weighed and not counted'. As held

by the Supreme Court in Jose v. State of Kerala (AIR 1973 SC 944) law does not require plurality of witness and conviction can be made only on the basis of single witness if it is wholly believable. There is no possibility of seeing the incident that took place in the house at night by any other witness. In such circumstances, burden of the prosecution is not very heavy. In Trimukh Maroti Kirkan v. State of Maharashtra (2007 Crl.L.J.20) it was held by the Apex Court as follows:

> "12. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See: Stirland v. Director of Public Prosecution (1944 AC 315) - quoted with approval by **Arijit Pasayat, J.** in State of Punjab v. Karnail Singh ((2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having

> regard to the facts and circumstances of the case. Here, it is necessary to keep in mind S.106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:
>
> > "(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."
>
> Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character."

21. As held in Anilkumar v. State of UP ((2003) 3 SCC 569), circumstances in which occurrence took place were such that facial expressions of the assailant will get embossed in the memory of the witness as his close relatives were killed and he himself was injured. Of course, the evidence of a child witness, especially when he was the solitary eye witness, need be corroborated as held by the Apex Court in State of UP v. Ashok Dixit and another ((2000) 3 SCC 70) and Arbind Singh v. State of Bihar (AIR 1994 SC 1068). In this case, evidence of PW14

is corroborated by the evidence of PWs 15 and 16 and medical and scientific evidence like finding of hair in the house etc. There is no reason to disbelieve the evidence of PWs 15 and 16. There is no case that they were inimical to the accused. They were natural witnesses. In High Ranges, regular bus services are few. People use taxi jeeps for transport especially after bus services are stopped. Accused entered the jeep and at the time when the jeep left Mananthavady he was standing in the vehicle. Thereafter, he got inside the jeep and sat near PWs 15 and her sister-in-law and he wanted to get down at the bus stop near Puthenpura colony, but, he could not alight there. Then, he wanted to stop at Norbert House which is very close to the house of the deceased. They also stated regarding the existence of light from the jeep. Even otherwise, they were travelling together and jeep was stopping at different places. They were not sitting in total darkness. There is nothing to disbelieve PWs 15 or 16. Further, the evidence is corroborated by medical evidence. MO18 was found out after few days by the Circle Inspector near the compound. Merely because dog squad did not go near the chopper, socks and bath towel found at the time when they

were brought is not a ground for disbelieving the Circle Inspector who found those items from the premises. In any event, the scientific evidence regarding the presence of hairs similar to those of the accused also corroborate the evidence of PWs 14, 15 and 16.

22. There is no rule that if there is only one sole eye witness, his evidence shall not be accepted by the court. Here, after going by the evidence of PW14, we believe the evidence of PW 14. Even though he might not have seen some part of the incident, presence of the accused and his inflicting injury on the mother and on him cannot be disbelieved. He was an injured witness. Though he was aged nine years at the time of accident, there is no substantial variation from the earlier statements. Some discrepancy is natural. But, here, there is no substantial difference from his earlier versions and he gave consistent evidence. His evidence is substantively corroborated. It is also argued that after the incident, a photograph was published in Deshabhimani along with news on 23.2.2001 (Ext.D7). But, identification factors were given by PWs 14, 15 and 16 to the police much before and portrait was drawn by PW19 on the basis of evidence of PWs 14, 15 and 16.

Identification parade was conducted on 23.1.2001. Photograph published on 23.2.2001 has no effect in the identification parade or drawal of portrait by PW19. The argument that drawing master (PW19) could have drawn the portrait (MO22) from some of the photos also does not appear to be correct. If photos were seen by him much more similar portrait could have been drawn. Drawing master (PW19) has deposed that he got descriptions of the accused from PWs 14, 15 and 16 etc. and drew several sketches and, finally, drew the sketch. On perusing the portrait also, it can be seen that there are some differences between the photograph of the accused and the portrait and it is not drawn from any photos. Even though there is some similarity with eyes etc. it cannot be stated that it is a portrait drawn from a photograph as contended by the accused. There is nothing to disbelieve PW 19 also. Further, drawing of the portrait and test identification parade etc. are only external aids to the investigating agency in facilitating the investigation. Here, the overall evidence would show that accused is guilty and accused alone is guilty and the accused entered the house of the deceased at about 8.30 p.m. and committed these murders.

23. The motive alleged is robbery. It is true that the jewellery alleged to have been stolen was not found out and money and some ornaments were still in the house which were not taken away by the accused. When there was resistance which resulted in the killing of the women and of the two children, the accused was not able to take away the money or all gold ornaments, but, it is not a ground for disbelieving the prosecution case. What was the mental state of the accused after murder was committed, whether he saw light, feared presence of somebody outside the house etc. are only matters of imagination. Proof of motive is not necessary to support a conviction when court is satisfied by other evidence that accused is the assailant of the violence as held by the Apex Court in Narayan Nathu Naik v. State of Maharashtra (AIR 1971 SC 1656). It is true that when there is direct evidence, motive has not much importance and motive, being the mental state of a person, it cannot be proved with precision. A person coming in the night when husband was away and taking away some of the ornaments after committing murder etc. proves the motive. But, in this case, because of the direct evidence of PW14 who saw the incident and corroborated by other medical

and scientific evidence, proof of motive is not much important. We are of the opinion that motive part is also proved in this case by sufficient evidence even though accused did not fully achieve the goal and no interference is needed in the conviction of the accused under section 302 of the Indian Penal Code.

24. With regard to the sentence, there is no dispute that this is a case of brutal murder by inflicting injuries on a hapless women of 38 years and her two children. Another nine year old child was also injured seriously. All of them sustained serious injuries on the head and the accused came there with dangerous weapon, but, it is settled law that in every gruesome murder, death sentence need not be awarded. Death sentence can be imposed only in rarest of rare cases and general rule is to impose life sentence in cases of offence under section 302 of the Indian Penal Code. Imposition of death sentence is an exemption to be imposed only in rare cases. The accused was aged around 30 year at the time of occurrence. There is still time for reformation. He has also requested for a chance for reformation. We have considered the aggravating and mitigating circumstances pointed out by the Supreme Court

in Bachan Singh v. State of Punjab ((1980) 2 SCC 684 and in Machhi Singh and others v. State of Punjab ((1983) 3 SCC 470). We are of the opinion that this is not a case which can be called as a 'rarest of rare cases'. Therefore, we set aside the death sentence, instead, he need suffer only life imprisonment.

23. With regard to sentence imposed for other offences, we are of the opinion that no modification is necessary as prosecution was able to prove the offence.

24. The Death Sentence Reference is answered accordingly and the Criminal Appeal is disposed of confirming the conviction under section 302 IPC and converting the death sentence imposed under section 302 to life imprisonment under section 302 of the Indian Penal Code and confirming the conviction and sentence imposed under other offences.

J.B.KOSHY
JUDGE

K. HEMA
JUDGE

vaa

J.B. KOSHY AND
K.HEMA,JJ.

D.S.R.NO.2/2006 AND
CRL.APPEAL NO.2314/2006

Judgment

Dated:28th September, 2007